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SUPREME COURT, U. S.

No. 217

IN THE

Supreme Court of The United States

October Term, 1963

STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,
Appellant

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.

MOTION TO AFFIRM.

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MOTION TO AFFIRM.

Railroad appellees,[1] pursuant to Rule 16(1)(c) of the Revised Rules of this Court, move that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

[1] The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island and Pacific Railroad Company, The Garden City Western Railway Company, The Kansas City Southern Railway Company, Kansas City Terminal Railway Company, Kansas, Oklahoma & Gulf Railway Company, Midland Valley Railroad Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, Northeast Oklahoma Railroad Company, St. Louis-San Francisco Railway Company, and Union Pacific Railroad Company.

STATEMENT.

This is a direct appeal from a final judgment entered April 10, 1963 by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by appellant to set aside an Interstate Commerce Commission order entered July 31, 1962, increasing certain rates on freight traffic moving intrastate by rail within Kansas. The Commission's order was entered in furtherance of its report and findings of December 1, 1961, in I.C.C. Docket 33239, *Kansas Intrastate Freight Rates and Charges*, 315 I.C.C. 223. The opinion of the district court is reported at 216 F. Supp. 376.

The Interstate Commerce Commission, in its decisions of December 17, 1956 and August 6, 1957, respectively, in Ex Parte No. 206, *Increased Freight Rates, Eastern and Western Territories, 1956*, 299 I.C.C. 429, and *Increased Freight Rates, Eastern, Western and Southern Territories, 1956*, 300 I.C.C. 633, generally authorized increases of 12% in interstate freight rates in Western Territory. Corresponding relief as to Kansas intrastate freight rates was sought by the Kansas railroads; in its decisions of April 23, 1958 and June 2, 1958, the State Corporation Commission of the State of Kansas (hereinafter referred to as the Kansas Commission) authorized increases in intrastate rates on some commodities, but refused to permit any increase in intrastate rates on the following: sand; gravel; crushed stone, including chat; building aggregates, including expanded clay or shale cinders; agricultural limestone; brick; clay sewer pipe; clay drain pipe and related articles; bituminous coal; petroleum and petroleum products, including liquefied petroleum gas; and cement.

In decisions dated February 11, 1958 and September 9, 1958, in Ex Parte No. 212, *Increased Freight Rates, 1958*, 302 I.C.C. 665, 304 I.C.C. 289, the Interstate Commerce

Commission authorized further increases, in varying amounts, in interstate freight rates and charges. Corresponding increases in intrastate freight rates again were sought by the Kansas railroads. The Kansas Commission, in its order of April 22, 1959, authorized corresponding increases in intrastate freight rates on some commodities, but refused to permit increases on the following: sand; gravel; crushed stone; chat; road aggregates; lightweight building aggregates; agricultural limestone; brick; clay sewer pipe, drain tile, and related articles; bituminous coal, petroleum and petroleum products; and hay.

In an order dated December 11, 1959, in its Docket 33239, the Interstate Commerce Commission instituted an investigation under Section 13(4) of the Interstate Commerce Act (49 U.S.C. 13(4)) upon petition of thirteen Kansas railroads (appellees herein) to determine whether intrastate freight rates and charges imposed by authority of the State of Kansas, by reason of the failure of such rates and charges to include increases corresponding to those permitted in interstate rates in Ex Parte Nos. 206 and 212, caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce.

Full hearing was had on March 23 through March 25, 1960. The record contains 54 exhibits and 465 pages of testimony. An examiner's recommended report was issued, and the parties were heard in oral argument.

The Interstate Commerce Commission issued its findings and conclusions in a report dated December 1, 1961. The Commission approved the increases sought by the Kansas railroads, except in rates on bituminous coal and refrac-

tories,[2] and concluded that such higher rates would increase the revenues of those railroads by substantial amounts.

Two successive petitions for reconsideration were filed by the Kansas Commission, and these were denied by the Interstate Commerce Commission in orders of April 10, 1962 and July 6, 1962. Thereupon the Interstate Commerce Commission issued its order of July 31, 1962 requiring the Kansas railroads to place into effect the higher intrastate freight rates approved in the Commission's report.

The Kansas Commission, on August 29, 1962, instituted the instant suit seeking to have the Interstate Commerce Commission's order of July 31, 1962 enjoined and set aside. Upon filing of the complaint a three-judge district court was convened.

The plaintiff-appellant contended that finding 6 of the Interstate Commerce Commission's report (315 I.C.C. 241), to the effect that the increased rates "will increase the revenues of the respondents by substantial amounts" was not supported by substantial evidence. After a comprehensive review of the evidence, the court by unanimous opinion concluded that (216 F. Supp. 384):

> "The question of the weight of the evidence was for the Commission and not for the Court. The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case, there is unjust discrimination against interstate commerce and that purpose extended to the prohibited discrimination produced by intrastate rates. In such a situation, when the Commission exercises its authority after hearing and proper application of rules of law, its findings of fact supported by substantial evidence are not subject to review. The Court may not substitute its judgment for that of the Commission. (See State of Florida v. United States, 292 U.S. 1, 54 S. Ct. 603, 78 L. Ed. 1077).

[2] The carriers voluntarily had withdrawn requests for increases in rates on cement and on brick other than refractories.

"We think the Interstate Commerce Commission had before it all of the evidence which was necessary in accordance with the criteria which must be considered in making a decision. Consequently, its judgment must be affirmed."

QUESTIONS PRESENTED FOR REVIEW.

The first question presented by appellant (Jur. St. 3) is whether the 1958 amendment to Section 13(4) of the Interstate Commerce Act (49 U.S.C. 13(4)) makes it unnecessary for the Interstate Commerce Commission to consider what effect an increase in an intrastate freight rate will have upon the volume of intrastate traffic in that commodity, and whether, secondly, that amendment authorizes the Commission to base its order "upon evidence related exclusively to the total revenue effect of system-wide increases on all commodities."

The second question presented is couched in the following language (Jur. St. 3):

"2. Since the enactment of Section 10(e) of the Administrative Procedure Act, is the reviewing court not required to consider and independently weigh the findings of the trial examiner and testimony and evidence opposed to the findings of the Interstate Commerce Commission, in determining whether or not the findings of the Commission are supported by substantial evidence?"

It should be noted that, in appellant's notice of appeal (Jur. St. App. p. 19) the second question is presented in substantially different language, as follows:

"2. In a judicial review of an order of the Interstate Commerce Commission requiring an increase in intrastate rates on a specific commodity, is the court, in determining whether or not the order is supported by substantial evidence, required by Section 10(e) of the Administrative Procedure Act to consider the evidence to the effect that an increase in the intrastate rates on

> that commodity will result in such a diminution in rail movement of the commodity as to result in less, rather than more, rail revenues thereon?"

Question 2 in the notice of appeal, it will be observed, is confined narrowly to the extent to which it is necessary "to consider the evidence to the effect that, etc.," while Question 2 in the Jurisdictional Statement inquires, in much broader terms, whether it is necessary "to consider and independently weigh the findings of the trial examiner and testimony and evidence, etc."

Rule 15(1)(c)(2) of the Rules of this Court provides:

> "The phrasing of the questions presented need not be identical with that set forth in the notice of appeal (see paragraph 2 of Rule 10) but the jurisdictional statement may not raise additional questions or change the substance of the questions already presented."

It is submitted that Question 2 as presented in the Jurisdictional Statement raises additional issues not fairly encompassed within Question 2 of the notice of appeal, is therefore offered in violation of the Rules of this Court, and should not be considered on its merits by the Court. Out of an abundance of caution, however, appellees will discuss Question 2 substantively.

ARGUMENT

The Finding that Revenues Will Be Increased Substantially Is Supported by Substantial Evidence.

The effect of one of the 1958 amendments to Section 13(4) of the Interstate Commerce Act has been brought into issue in Question 1 of the Jurisdictional Statement. The amendment in question added the phrase "undue burden on interstate commerce" in order to facilitate proof of a revenue discrimination. The purpose of this amendment is outlined clearly in the following portion of its legislative history (Senate Report No. 1647, June 3, 1958, 85th Cong., 2nd Sess., p. 20):

> "The grounds upon which the Interstate Commerce Commission may require changes in intrastate rates would be more clearly defined. * * * In many instances, because of the vagueness of this standard, it is impossible as a practical matter to make the showing necessary to justify an order by the Commission requiring an adjustment in intrastate rates, fares, or charges. This situation would be substantially and beneficially corrected by authorizing the Commission also to require changes in intrastate rates, fares, or charges found by it to impose an undue burden on interstate commerce."

Under the amended statute, it is submitted, in an intrastate rate case following a general interstate rate increase proceeding, the Commission must determine whether the evidence discloses any intrastate transportation or economic conditions so different as to warrant an exception to the interstate order; in the absence of such a showing, as is the case here, the evidence which forms the basis of the Commission's nationwide orders becomes the natural basis for its order in this case. Although here the evidence in support of the Commission's order would have been adequate in the light of the judicial interpretations of Section 13(4)

before the 1958 amendment, under that amendment the standards are less exacting.

Apart from the effect of the 1958 amendment to Sec. 13(4) of the Interstate Commerce Act, appellant is in error in insisting that the effect of increased freight rates upon the *volume* of traffic is in itself significant (Jur. St. 3, 7). What is significant is the effect of increased freight rates upon gross revenues, which may thereby be increased even if there is some diminution in volume. This critical distinction has been recognized repeatedly by the Commission and the courts. For example, in *South Carolina Intrastate Freight Rates and Charges*, 296 I.C.C. 159, 177, affirmed in *South Carolina* v. *United States*, 136 F. Supp. 897 (E.D. S.C., 1956), affirmed *per curiam* 351 U.S. 944 (1956), the Commission stated:

> "While the evidence is convincing that some, and perhaps a material, diversion of traffic in some of these commodities will result from the increases herein approved, nevertheless, after weighing carefully protestants' and respondents' testimony, we reach the conclusion that a substantial increase in respondents' revenues can reasonably be expected from intrastate rates as thus increased, and that such rates will not in any instance exceed a just and reasonable basis."

To the same effect, see *Arkansas Intrastate Freight Rates and Charges*, 298 I.C.C. 547, 560, affirmed in *Arkansas Public Service Commission* v. *United States*, 147 F. Supp. 454 (E.D. Ark., 1956), affirmed *per curiam* 355 U.S. 4 (1957); *Louisiana Intrastate Freight Rates and Charges*, 291 I.C.C. 276, 314, affirmed in *Louisiana Public Service Commission* v. *United States*, 125 F. Supp. 180 (E.D. La., 1954), affirmed *per curiam* 348 U.S. 885 (1954).

In the instant case, substantial evidence, discussed fully by the district court (216 F. Supp. 376, 381-384) demonstrates that the proposed rate increases might reasonably

be expected to produce substantial additional revenues for the carriers, as found by the Commission. The irrelevance of the effect of a rate increase upon volume of traffic alone, without consideration of its effect upon gross revenues, is illustrated by the court's analysis of Exhibit 25 (216 F. Supp. 383):

> "Mr. William R. Wientge, Commerce Assistant of the St. Louis-San Francisco Railway, discussed Exhibit 25 showing that company's tonnage and freight revenues for each year from 1946 through 1959 (R. 182). Exhibit 25 indicated that the Frisco's system tonnage for 1959 was only 91.5 per cent of that of 1946 while system revenue in 1959 was 150 per cent of that of 1946, demonstrating that a loss in traffic does not necessarily make rate increases self-defeating."

The second issue raised by Question 1 in the Jurisdictional Statement is whether the Commission's finding that the increased rates would produce substantial increases in revenue can be based "upon evidence related exclusively to the total revenue effect of system-wide increases on all commodities." The question presented by appellant is inaccurate in its description of the evidence presented by these appellees. The evidence which appellees did present is much more comprehensive than is implied by use of the word "exclusively."

Particularly significant is the testimony presented by Mr. Herman C. Kroll, Manager of the Western Traffic Association. Page 1 of Exhibit 35, prepared and presented by Mr. Kroll, demonstrated that the major Kansas railroads handled 4.60 per cent more ton-miles in 1958 than in 1946 and earned 51.05 per cent more gross freight revenue in 1958 than in 1946. The years 1946 to 1958, inclusive, were years of recurring interstate and intrastate freight rate increases, and the evidence in this exhibit shows that any traffic diversion that might have been suffered by the Kansas railroads was not sufficient to defeat the purpose of

the rate increases, that is, the production of greater revenue. Even more pertinent is page 2 of the same exhibit, which shows the revenue trends of these same railroads considering only traffic to, from, through, and within Kansas; the ton-miles of Kansas traffic rose 4.03 per cent from 1946 to 1958, but the freight revenues increased 56.44 per cent in the same period. Significant extracts from the record of the direct and cross examination of Mr. Kroll are as follows:

> "The exhibit which has been marked for identification as 35 has been prepared for the purpose of demonstrating what the experience of the carriers has been with the Ex Parte increases which have become effective in the post-war period. (R. 336)[3].
>
> "The information shown in column 4, I believe, demonstrates that the Ex Parte increases have accomplished exactly what the carriers intended them to do, and that is to produce substantially increased revenues on rather short notice, because with the ton miles in 1958 4.6 per cent higher than they were in 1956, the gross freight revenue is 51.05 per cent greater.
>
> "On page two of this exhibit, I have made a similar comparison, but here I am dealing with the tons, ton miles and revenues of traffic handled to, from, through and within the state of Kansas. Here we find a very similar situation to what was true of the system operations.
>
> "I will not burden the record by reading all the figures, but will merely use 1958 as an example. The tons carried in 1958 were approximately three per cent less than they were in 1946. Nevertheless, the revenue ton-miles were 4.03 per cent greater and the revenue was 56.44 per cent greater. (R. 337).
>
> • • • • •
>
> "Q. (by Mr. Gray) It's not intended to prove that you get any additional revenue even though the par-

[3] References to pages of the transcript of the proceedings before the Interstate Commerce Commission are identified herein with the prefix "R."

ticular increases sought here are granted, is that correct?

A. Well, Mr. Gray, as a statistician, I think that Exhibit 35 leads you almost to the inescapable conclusion that there are going to be some increased revenues, but I don't feel as a statistician I can say with any preciseness . . ." (R. 342).

Supplementing Mr. Kroll's presentation, experienced traffic officials of five of the major Kansas railroads testified that the proposed rate increases could be expected to produce increases in revenues. Furthermore, each of these witnesses supported his opinion testimony with statistical evidence concerning the effect of previous general rate increases in producing higher revenues for their respective companies (R. 52-54, 80, 107, 133-135, 177-179, 181-193, 195-219, Exs. 19, 23-26). The testimony of these witnesses, as well as of Mr. Kroll, was discussed at some length by the district court (216 F. Supp. 381-384).

The court below concluded that the evidence presented by the railroads to the effect that the increased freight rates would not be self-defeating and could reasonably be expected to produce substantially greater revenue was sufficient to satisfy the requirements of Section 13(4) of the Interstate Commerce Act. The court stated (216 F. Supp. 384):

"These witnesses, representing the railroad systems operating in Kansas and familiar with the traffic rates and revenues of the various companies, testified with certainty that while there might be some diversion of traffic, (by reason of the increase in rates) the net result of the increase of rates would be to substantially increase revenues. Plaintiff complains that the evidence offered by these witnesses was based on consideration of the effect of general increases on all commodities in the past and not upon what the result might be in the future as to particular commodities. As stated

> previously, in this proceeding the Commission is not obliged to consider reasonableness of each individual rate before carrying into effect the necessary increased schedule. The Commission may provide in its order for modification of the general order in specific situations where the general order might not be justly applicable. (See King v. United States, 344 U.S. 254, 275, 73 S. Ct. 259, 97 L. Ed. 301 (1952)). This, the Commission by its order, made provision for in this case."

The foregoing conclusion of the district court is correct, it is submitted, in its analysis of the measure of evidence required to support the conclusion that the rate increases will result in substantial revenue increases. *Arkansas Public Service Commission* v. *United States*, 147 F. Supp. 454 (E. D. Ark., 1956) affirmed *per curiam* 355 U.S. 4 (1957), upheld (insofar as is pertinent here) the Commission's decision in approving intrastate freight rate increases in *Arkansas Intrastate Freight Rates and Charges*, 298 I.C.C. 547. Evidence of the railroads in that case on the question whether the rate increases would result in substantial revenue increases was based upon predictions of traffic officials of the principal Arkansas railroads, supported by statistical evidence showing trends of tonnage and revenue (298 I.C.C. 559) similar to what was offered in the instant case. The district court there described such supporting evidence as "quite substantial" (147 F. Supp. 464).

In *Increases in Intrastate Freight Rates*, 186 I.C.C. 615, 642, the Commission, in approving proposed increases in certain Louisiana intrastate rates, noted that (186 I.C.C. 640):

> "Railroad traffic men expressed the opinion that, notwithstanding possible diversion of traffic to other transportation agencies, the addition of the surcharges to the intrastate rates would produce an increase in revenue."

In upholding the Commission's order, the Supreme Court, in the leading case of *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933), declared:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see Manufacturers Ry. Co. v. United States, 246 U.S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute."

Evidence Relied Upon by Plaintiff-Appellant.

Question 2 of the Jurisdictional Statement inquires, in determining whether the Commission's findings are supported by substantial evidence, whether the reviewing court must "consider and independently weigh" (a) those findings of the examiner which were inconsistent with some of the subsequent findings of the Commission, and (b) evidence of record not consistent with the findings of the Commission.

The appellant seemingly urges that the reviewing court should give particular weight to the findings of the hearing examiner. In effect, it is submitted, the appellant is urging that the court should substitute the examiner's views for the views of the Commission in weighing the evidence; it is well established that the reviewing court cannot do that which appellant urges it is required to do. In *Cleveland Electric Illuminating Co.* v. *United States*, 147 F. Supp. 622 (N.D. Ohio, 1956), affirmed *per curiam* 354 U.S. 917 (1957) which likewise involved an order of the Interstate

Commerce Commission increasing intrastate freight rates, the reviewing court stated (147 F. Supp. 630):

> "This court cannot substitute its judgment or *the judgment of the examiner* for that of the Commission." (Emphasis supplied.)

To the same effect, see *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 758 (E.D. Va., 1950), affirmed *per curiam* 340 U.S. 802 (1950).

Appellant has charged that the district court "looked only to evidence supporting the order" (Jur. St. 6, 10). However, it is perfectly clear from reading the district court's opinion that that court did, in fact, review all of the evidence and not merely the substantial evidence supporting the order. Thus, the court stated (216 F. Supp. 380):

> "It is clear to the Court, after *examining* this section and *the entire record* . . .
>
> • • • • •
>
> "Upon an *examination of the record*, we must conclude that the Interstate Commerce Commission applied the correct rule of law to the problem which was before it for consideration." (Emphasis supplied.)

A significant indication that the Interstate Commerce Commission, as well as the district court, did in fact give careful consideration to evidence presented in opposition to the proposed rate increases is found in the Commission's conclusion that the evidence did not justify increasing the rates on bituminous coal. In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286 (1934), this Court declared:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader,

> upon the face of the report. The rates were not approved as the respondents had submitted them. For the 80,000 pound minimum, they were found to be too low. Not till there had been an increase of four cents per 100 pounds did the schedule win approval. There was a sedulous endeavor to guard against a rate war that would end in mere oppression."

In essence, the appellant's argument is that the findings of the Commission are contrary to the weight of the evidence, and that the district court erred in failing to draw inferences contrary to those drawn by the Commission.

An examination of the evidence of record will demonstrate that the testimony of shippers opposing the proposed rate increases does not affect the evidence offered in support of the increases so adversely that there is a lack of substantial evidence in support of the Commission's findings.

The appellant refers (Jur. St. 8) to statistical evidence comparing total Kansas production of crushed stone, sand, gravel, chat and road aggregates with Kansas intrastate rail shipments of members of a particular association only, and not including their sales to railroad companies (R. 396, 406, Exs. 41-43). Significantly, the witness who presented that evidence admitted that (1) the bulk of the increasing Kansas production of these materials is at portable plants which do not have rail service, (2) there are service advantages in using trucks for relatively short hauls, and (3) the majority of truck shipments move for distances of less than 50 miles, while the majority of rail shipments move for distances of more than 50 miles (R. 407-408). Obviously, the level of the rail rates would have little bearing upon the extent of the transportation by truck from the portable plants.

On the other hand, the Commission was able to rely upon additional facts contained in its reported decisions revealing that the total Kansas intrastate rail volume of ship-

ments of these commodities (sand, gravel, and crushed stone) had remained at a relatively constant level for many years, during which there had been recurrent intrastate freight rate increases, thus demonstrating strongly that further increasing the rates on such commodities would not be self-defeating. In the instant case a traffic sampling, projected to a full year, showed that the annual Kansas intrastate volume of these commodities for a constructive year in 1958 and 1959 was 33,717 carloads (Ex. 36). This quantity compares closely with a volume of 36,184 carloads for a constructive year in 1956, referred to in *Kansas Intrastate Freight Rates and Charges*, 305 I.C.C. 335, 349, as well as annual movements of 31,781 carloads in 1950 and 30,336 carloads in 1947, referred to in *Kansas Intrastate Freight Rates and Charges*, 286 I.C.C. 501, 508.[4] In addition, in authorizing increases in the interstate rates on these commodities, the Commission had noted that the interstate traffic volume "had been maintained at a constant level" and concluded that a further rate increase would have "only a nominal effect on the volume of traffic moving by rail." *Increased Freight Rates, 1958*, 304 I.C.C. 289, 338.

Where, as Here, the Commission's Order is Supported by Substantial Evidence, the Court Cannot Substitute Its Views for Those of the Commission.

As outlined above in this motion (pp. 8-11), the finding of the Commission that the increases in freight rates would produce substantial increases in revenues is supported by substantial evidence. Under these circumstances the reviewing court cannot substitute its views upon the weight of the evidence for those of the Commission. *Cleveland Electric Illuminating Co.* v. *United States*, 147 F. Supp. 622, 630 (N.D. Ohio, 1956), affirmed *per curiam* 354 U.S. 917 (1957); *Alabama* v. *United States*, 141 F. Supp. 488,

[4] These statistics were called to the Commission's attention in the oral argument (R. 471).

495 (N.D. Ala., 1956); *South Carolina* v. *United States*, 136 F. Supp. 897, 902 (E.D. S.C., 1956), affirmed *per curiam* 351 U.S. 944 (1956); *King* v. *United States*, 101 F. Supp. 941, 945 (N.D. Fla. 1951), affirmed 344 U.S. 254 (1952); *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933).

Particularly pertinent are the observations of the reviewing court in *Arkansas Public Service Commission* v. *United States*, 147 F. Supp. 454, 464 (E.D. Ark., 1956), affirmed *per curiam* 355 U.S. 4 (1957), upon the very issue here involved, as follows:

> "The Arkansas Commission also contends that the increase will cause a large amount of present rail traffic to be diverted to trucks and that, as a result, the increases will not produce additional revenue to the rail carriers, and that the Interstate Commerce Commission's finding to the contrary is not supported by substantial evidence. There was much—we think quite substantial—evidence, both ways, on this issue, and it was, thus, one of fact, for resolution by the Interstate Commerce Commission, and its finding thereon must be held to be supported by substantial evidence."

The most recent decision of this Court in reviewing issues similar to those of the instant case is *North Western-Hanna Fuel Co.* v. *United States*, 161 F. Supp. 714 (D.C. Minn., 1957), affirmed *per curiam* 356 U.S. 581 (1958). There the district court declared (161 F. Supp. 719):

> "The danger of diminishing freight revenues by the imposition of increased freight rates is always a relevant and formidable factor for the Commission to consider when such increases are promulgated. The nationwide impact of the increased rates under Ex Parte No. 175 no doubt is well known to the Commission. And that body is in a far better position than the Court to appraise and weigh the diverse opinions of witnesses for the railroads, the shippers, and the consumers in this regard. We cannot say, or even assume to predict, which prophetic opinions as to the

impact of higher freight rates are the most sound and reliable. We assume, however, that the railroads will avail themselves of any rights they may have to meet any such increased competition by decreasing their rates below the increases permitted under Ex Parte No. 175 when competitive circumstances suggest such adjustments."

CONCLUSION.

For the foregoing reasons we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should therefore be affirmed.

Respectfully submitted,

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July 12, 1963

PROOF OF SERVICE.

I, Harvey Huston, counsel of record for railroad appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of July, 1963, I served copies of the foregoing Motion to Affirm on the several parties as follows:

On plaintiff-appellant by mailing copies, with air mail postage prepaid, to Byron M. Gray, 700 KPL Tower, 818 Kansas Avenue, Topeka, Kansas, and Robert Londerholm, State Corporation Commission, State Office Building, Topeka, Kansas.

On the United States by mailing copies with air mail postage prepaid, to the Solicitor General, Washington 25, D.C.; John H. D. Wigger, Attorney, Department of Justice, Washington 25, D.C.; and Newell A. George, United States Attorney, Topeka, Kansas.

On the Interstate Commerce Commission by mailing copies, with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and Stanton P. Sender, Attorney, Interstate Commerce Commission, Washington 25, D.C.

.....

Harvey Huston